IN THE SUPREME COURT OF SIERRA LEONE

Civ.App.1/73

Sierra Leone Oxygen Factory Limited — Plaintiffs/Appellants

And

P. B. Pyne-Bailey — Defendant/Respondent

Judgment delivered on Friday day the 10th day of May, 1974.

Browne-Marke, J.S.C. — This appeal is from the judgment of the Sierra Leone Court of Appeal dated the 25th day of May, 1972, dismissing an appeal from an Order of the High Court dated 30th November, 1971, ordering that the judgment in default of appearance obtained on the 14th day of June, 1971 be set aside.

The proceedings were commenced by a Writ of Summons accompanied by a Statement of Claim and dated the 24th day of March, 1971. The appellants claimed on the said Writ, damages for breach of contract and for wrongful detention of goods. In the statement of claim signed by their Solicitor the appellants alleged the following:-

"On or about the 26th day of October, 1969 the Defendant collected from the Plaintiff for rewinding one (1) 85 Horse Power Electric Motor No. 027490 made by Enrico Bazzi of Milan in 1965 which the Defendant examined and agreed to rewind at the sum or cost of One thousand three hundred and fifty leones (Le.1,350.00). The Plaintiff paid to the Defendant the whole of the sum of Le.1,350.00 in advance at the Defendant's request on the 7th November, 1969.

2. It was an implied term of the contract that the machine would be properly and efficiently re-wound and the Defendant impliedly represented and held out to the Plaintiff that he had the necessary skill and knowledge to do so.

3. The motor was being used at the Plaintiff's premises in the manufacture of oxygen and time was of the essence of the contract.

4. After a considerable delay and in early 1970, the Defendant returned the motor to the Plaintiff, but the work had been so inefficiently carried out that the inductor wire would not even fit in the case and the motor was unusable. The Plaintiff thereupon forthwith informed the Defendant who after a few days inspected the motor and subsequently collected it for re-winding.

5. Up till the 31st August, 1970, the Defendant neither repaired the motor nor refunded the sum of Le.1,350 notwithstanding several requests by the Plaintiff for the Defendant to do so.

6. In the result the Plaintiff incurred considerable loss while the machine was in the possession of the Defendant and had to secure a replacement motor to enable it to execute its contracts.

The Plaintiff has suffered loss and damage thereby.

7. On or about the 19th day of August, 1970, the motor was collected by the Plaintiff and repaired by another firm at the cost of Le.548.

Particulars of Loss and Damage

(a) Cost of obtaining another motor Le.3,000.00

(b) Loss of Sales of manufactured products 1,500.00

8. The Plaintiff therefore claims:

(a) Special damages of Le.4,500.00

(b) A refund of the deposit of Le.1,350.00

And the Plaintiff claims general damages.

The affidavit of service sworn by one David Momoh on 11th June, 1971 states that the Writ of Summons was served on the Respondent at his place of business Sierra Engineering Agencies, 14, Pademba Road, Freetown, on the 25th March, 1971. The said David Momoh swore to a second affidavit of search on the same date which states that no appearance had been entered by or on behalf of Respondent.

Judgment in default was obtained as to part of the claim on 14th June, 1971, for Le.1,350.00, damages to be assessed and costs to be taxed. The judgment was signed by Mr. William Johnson, Master and Registrar.

On the 25th day of October, 1971, the Solicitor for the appellants made an application for a Writ of Fieri Facias endorsed to levy Le.5,850.00 and interest thereon at the rate of Le.10.00 per cent per annum as from 14th June, 1971. The Deputy Master and Registrar signed the writ of Fieri Facias on behalf of the Master and Registrar to levy execution for Le.5,850.00 with interest at 4 per cent per annum.

By notice of motion dated 2nd November, 1971, Mr. E. O. Mackay applied to the High Court on behalf of the Respondent for an Order that the judgment in default of appearance dated the 14th day of June, 1971, be set aside and execution there-under be stayed for the reasons shown on the affidavit of the Respondent sworn on the same date. Further that the Statement of Defence exhibited by the Respondent be filed and served on the appellants' Solicitor.

The application came up before Ken During, J. on 5th November, 1971, but Mr. Mackay on behalf of Respondent/Applicant requested an adjournment on the ground that it was short served. The adjourned date was 9th November, 1971, on which date Dr. Marcus-Jones appeared for Appellants/Respondents and Mr. Mackay on behalf of Respondent/Applicant.

After hearing Counsel for both parties and reading the affidavit filed in support by the Applicant/Respondent the application was refused. No mention was made of the Statement of Defence which was exhibited.

On 10th November, 1971, Mr. Mackay entered an appearance in the Master's Office on behalf of the Respondent. On the same date he filed another notice of motion for an Order that for the reasons shown in the affidavit of the Respondent/Applicant which was also filed, the writ of Fieri Facias and the whole proceedings be set aside on the ground of irregularity.

On the 12th day of November, 1971, before Tejan, J., Mr. Rogers-Wright with Mr. Mackay appeared on behalf of Respondent/Applicant. Counsel for Appellants/Respondents raised a preliminary objection that the motion was short served and Tejan, J., ordered an interim stay of execution of the writ of Fieri Facias.

On 30th November, 1971, the said motion came before Tejan, J., and after hearing Counsel for both parties, the learned judge ruled as follows:-

> "I have considered the arguments of both Counsel. There is no doubt a breach of the rules has been committed. In the interest of Justice, I allow the application to set aside the judgment. Costs in the cause."

On 10th December, 1971, Tejan, J. granted an application by Counsel for Appellants/Applicants for leave to appeal against the interlocutory judgment of the 30th November, 1971. The application was supported by an affidavit sworn by the Solicitor for Appellants on 7th December, 1971.

The ground of appeal as recorded was

> "That the Learned Trial Judge had no jurisdiction to entertain the Respondent's Notice of motion dated 10th November, 1971, by reason of the fact that on the 9th day of November, 1971, the High Court of Sierra Leone by an order of the Hon. Mr. Justice Ken O. During had dismissed a similar application made by the Notice of motion dated 2nd November, 1971, which said order remains in full force and effect."

The appeal was heard by the Sierra Leone Court of Appeal on 24th and 25th May, 1972. The judgment of the Court (Cole, C. J., Harding and Davies JJ/A) was as follows:-

> "In the interest of Justice we feel that the matter should go to trial. We therefore invoke our powers under Rule 36 of the Court of Appeal Rules and dismiss the appeal. No order as to costs."

Counsel for Appellants applied to that Court for leave to appeal from its judgment of 25th May, 1972 dismissing the appeal of Appellants. Conditional leave to appeal to the Supreme Court was given on 30th June, 1972 and Final leave on 13th July, 1972.

In the case for Appellants the principal question raised were

(i) That the judgment of Ken During J., of 9th November, 1971, was regular and that the High Court in exercising its undoubted discretion found no merit in the application to set it aside and properly refused leave to the Respondent to defend action. That in the circumstances a further application to the same tribunal was inappropriate and untenable except by way of leave to appeal.

(ii) That the effect of the Order of Tejan, J., was to reverse the decision of Ken During, J., although the Respondents' Counsel had specifically stated that it was a motion for an order to set aside judgment obtained on 14th June, 1971, on the grounds of irregularity.

That the grounds of irregularity alleged with respect to the judgment of 14th June, 1971, were neither set out in the motion dated 10th November, 1971, as required by Order 50 Rule 3, nor was any shown in the arguments of Counsel, nor any specified by Tejan, J., as justifying his order to set aside.

(iii) That the remedy, if any, open to the Respondent was to apply for a stay of the Writ of Fieri Facias (Order 30 Rule (16a) or to appeal to the Court of Appeal from the Order of During, J.

(iv) That judges of equal jurisdiction could not reverse each other whether on a matter involving exercise of discretion or otherwise.

Counsel for Appellants submitted:-

> That since the appeal before it was from the judgment or order, of Tejan, J., the Court of Appeal could not properly or validly have exercised its powers under Rule 36 of the Court of Appeal Rules.

In the case for the Respondent the principal questions raised were:-

(i) Whether the Deputy Master and Registrar on 25th October, 1971, had jurisdiction to sign a Writ of Fieri Facias for the sum of Le.5,850.00 when the judgment of 14th June, 1971, referred to in the said Writ was for the sum of Le.1,350.00

(ii) Whether the application before Ken During, J., was the same as that before Tejan, J.

It must be stated at this point that the application by Respondent dated 2nd November, 1971, was for an order that the judgment in default of appearance dated 14th June, 1971, be set aside and execution thereunder stayed for the reasons stated in the affidavit. The second application was for an order that for the reasons shown in the affidavit of the Respondent sworn on the 10th November, 1971, the Writ of Fieri Facias and the whole proceedings be set aside on the ground of irregularity.

The Deputy Master and Registrar on behalf of the Master and Registrar signed a writ of Fieri Facias on 25th October, 1971, but no mention was made of it in the notice of motion dated 2nd November, 1971.

By order 23 Rule 15 of the High Court Rules "Any judgment by default whether under this order or under any other of these Rules, may be set aside by the Court upon such terms as to costs or otherwise, as such Court may think fit." By order 50 Rule 3 "Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or Notice of Motion." The application before Ken During J. of the 2nd November, 1971, did not question the regularity of the judgment; although the writ of Fieri Facias had already been issued, the respondent only requested that the statement of defence exhibited be filed and served on appellant's solicitor. Ken During J. in his order gave no reasons for refusing the application and one cannot speculate that he considered the intended statement of defence before deciding. In this application respondent relied on Order 23 Rule 12 which provides that "Any verdict or judgment where one party does not appear at the trial may be set aside." It is not clear as to whether this rule led Ken During J. to refuse the application. The appearance entered on 10th November, 1971, was unconditional. The application before Tejan J. was made on the

In it the respondent requested "that for the reasons shown on his affidavit sworn on the 10th day of November, 1971, and filed, the writ of Fieri Facias and the whole proceeding be set aside on the ground of irregularity."

It seems from the second application that the complaint was not concerning the regularity of the judgment of Mr. Durin, J. but instead that the whole proceedings including the writ of Ieri Facias was irregular.

No further action was taken after the judgment of 14th June, 1971 until application was made to the Master and Registrar on 25th October, 1971, for a writ of Fieri Facias and no action was taken to amend the amount claimed although it was palpably incorrect.

The appellant being dissatisfied with the judgment and order of Tejan J. appealed to the Sierra Leone Court of Appeal to have the judgment set aside. Section 56 of the Courts Act No. 31 of 1965 provides:-

> (1) Subject to the provisions of this section, an appeal shall lie to the Court of Appeal -
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> (a) from any final judgment, order, or other decision of the Supreme Court given or made in the exercise of its original, prerogative or supervisory jurisdiction in any suit or matter; and
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> (b) by leave of the Judge making the order or of the Court of Appeal, from any interlocutory judgment, order or other decision, given or made in the exercise of any such jurisdiction as aforesaid:

In my view both applications were based on different facts and although the rules provide that the irregularities complained of must be specified the Court cannot close its eyes to a patent irregularity in the proceedings by which a greater amount was claimed than that for which judgment was obtained.

It is settled law that in certain circumstances a Court can vacate its own judgment.

In Thynne vs. Thynne reported in (1955) 3 All E.L.R., 129, Morris, P.J. in the course of his judgment said at page 145

> "I respectfully agree with what was indicated by Evershed, L. J. in Meier v. Meier (19) (1948) p. at p. 95):
>
> 'I prefer not to attempt a definition of the extent of the court's inherent jurisdiction to vary, modify or extend its own orders if, in its view, the purposes of justice require that it should do so.'

"Without in any way purporting to categorise and certainly without indicating any limits, a few illustrations in regard to the court's powers may be mentioned. (a) If there is some clerical mistake in a judgment or order which is drawn up there can be correction under the powers given by R.S.C., Ord. 28, R. 11, and also under the powers which are inherent in the jurisdiction of the court. (b) If there is some error in a judgment or order which arises from any accidental slip or omission, there may be correction both under Ord. 28, R. 11, and under the court's inherent powers. (c) If the meaning and intention of the court is not expressed in its judgment or order then there may be variation. In Lawrie v. Lees (10), Lord Penzance said (7 App. Cas. at p. 34):"

> 'I cannot doubt that under the original powers of the court, quite independent of any order that is made under the Judicature Act, every court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the court to vary them in such a way as to carry out its own meaning and, where language has been used which is doubtful, to make it plain. I think that power is inherent in every court.'

"To the same effect were the judgments in Re Swire (15). Lindley, L. J., said (30 Ch. D. at p. 246):"

> '..... if an order as passed and entered does not express the real order of the court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right ..... It appears to me, therefore, that, if it is once made out that the order, whether passed and entered or not, does not express the order actually made, the court has ample jurisdiction to set that right, whether it arises from a clerical slip or not.'

At page 146 Morris, L. J. continued.

> "A court may in the exercise of its inherent jurisdiction in some circumstances of its own motion (after hearing the parties interested) set aside its own judgment."

Again in the case of Attoh-Ouarshie vs. Okpoto reported in (1973) 1 G.L.R. (59) the following principle was laid down at page 60.

> "(3) Tradition has sanctioned three areas where the court generally invokes its inherent powers. First, where the exercise of the powers is necessary for the maintenance of the court's dignity and independence, such powers include the power to punish for contempt and enforce obedience to its mandates and judgments and orders. Secondly where the powers are necessary to ensure the control of its officers (including lawyers) the power to hold its officers to a proper accountability and any default or misfeasance in the execution of its process. Thirdly powers to prevent wrong or injury being inflicted by its own acts or orders or judgments including the power of vacating judgments entered by mistake and of relieving judgments procurred by fraud, and a power to undo what it had no authority to do originally."

Hayfron-Benjamin J. in the course of his judgment in the same case said at page 65

> "Having found that the provisions of Order 9, R. 17 are mandatory it is now necessary to consider whether or not the submission of counsel that the court has an inherent power to vacate its own

invalid orders is well founded. Inherent power is an authority not derived from any external source, possessed by a court. Whereas jurisdiction is conferred on courts by constitutions and statutes, inherent powers are those which are necessary for the ordinary and efficient exercise of the jurisdiction already conferred. They are essentially protective powers necessary for the existence of the court and its due functioning. They spring not from legislation but from the nature and constitution of the court itself. They are inherent in the court by virtue of its duty to do justice between the parties before it. The scope of inherent powers however cannot be extended beyond its legitimate and circumscribed sphere. The safest guide lines are precedents."

Unfortunately the judgment of the Appeal Court did not provide any guide lines on which this court may arrive at its decision but there appears to be two important issues which must be considered.

(1) Is it proper for a second application to be made before Tejan, J. the first application having been refused by Ken During, J.

(2) Is the amount for which judgment was obtained on 14th June, 1971 liquidated or unliquidated damages.

With regard to (1) having found that the applications before both Judges were not the same, I hold the view that it was proper for the Court to vacate the judgment in default in the light of the authorities cited above.

On the second point if the amount claimed was for liquidated damages then execution could be levied for the amount for which final judgment was obtained. If, on the other hand, the amount claimed should in fact be for unliquidated damages then it is subject to assessment by the court. From the particulars in the statement of claim it could easily be deduced that there was some consideration moving from the promisee.

Paragraphs 4, 5 and 7 already recited refer.

According to appellants, the work was inefficiently carried out but not that no work was in fact done.

I am of the opinion that this matter should proceed to trial for the following reasons:

1. Judgment in default was for liquidated damages which was not supported by the statement of claim, and as I have held that the claim was for unliquidated damages, such damages must be assessed.

2. Despite the requirements of order 50 rule 3, of the High Court Rules, Order 50 rule 1 provides as follows:-

"Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court shall

so direct, but such proceedings may be set aside either wholly or in part as irregular or amended, or otherwise dealt with in such manner and upon such terms as the court shall think fit."

The appeal is hereby dismissed. Costs to the respondent in this Court and ~~in~~ the Court ~~below~~.

N. E. Browne-Marke
Justice of the Supreme Court

Presiding

A. Macauley

Beca Davis

Livesey Luke, J.S.C.

On 20th March, 1971, the Sierra Leone Oxygen Factory Limited (hereinafter referred to as the Appellant Company) issued a writ of summons against P.B. Pyne-Bailey, carrying on business under the name of Sierra Engineering Agencies, (hereinafter referred to as the Respondant) claiming damages for Breach of Contract and for wrongful detention of goods. The writ was accompanied by a Statement of Claim which has already been set out by my learned brother Browne-Marke, J.S.C. The writ and the statement of claim accompanying it were served on the Respondent on 25th March, 1971. The 8 days limited for entering appearance expired without the Respondent entering an appearance, and up to 11th June, 1971 the Respondent had still not entered an appearance. On that date the Appellant Company by their Solicitor applied to the Master and Registrar to enter judgment in default of appearance for the sum of Le.5,850, damages to be assessed and costs to be taxed. The Master and Registrar refused to sign the judgment on the ground that the Appellant Company could not sign judgment for Le.5,850. The Master and Registrar accordingly informed the Appellant Company's Solicitor that no mention of the sum of Le.5,850 should be made in the judgment. Three days later however (i.e. on 14th June, 1971), the Appellant Company's Solicitor again submitted the Judgment in default in an amended form mf to the Master and Registrar for signature and on this occasion it was signed and entered by the Master and Registrar. Judgment was entered for Le.1,350, damages to be assessed and costs to be taxed.

No further steps were taken by either party until 25th October, 1971 when on the application of the Appellant Company's Solicitor, the Deputy Master sealed a writ of Fieri Facias to levy execution against the Respondent in respect of the judgment dated 14th June, 1971. The writ of Fieri Facias was for the recovery of Le.5,850 and interest thereon at the rate of Le.4 per centum per annum from the 14th day of June, 1971, "by a Judgment of our said Court bearing the date 14th day of June, 1971 adjudged to be paid by the said P.B. Pyne-Bailey to the Sierra Leone Oxygen Factory together with certain costs in the said judgment mentioned." It is pertinent to recall that the judgment dated 14th June, 1971 was for Le.1,350, damages to be assessed and

costs to be taxed. And it is important to note that the damages had not been assessed nor the costs taxed. It is therefore curious, to say the least, that the writ of Fieri Facias was issued for Le.5,850, an amount not sanctioned by the judgment which it was intended to enforce and especially as the Master and Registrar had declined to sign judgment for that same amount a few months earlier. Be that as it may, execution was levied against the Respondent, albeit without much success.

By Notice of Motion dated 2nd November, 1971 the Respondent, by his Solicitor, applied "for an order that the Judgment in Default of Appearance dated the 14th day of June, 1971 be set aside and execution thereunder be stayed." The motion was supported by an Affidavit sworn by the Respondent. In his affidavit, the Respondent explained the reason for his failure to enter appearance to the Writ of Summons and ended by saying that he had a good defence to the action. He also exhibited a copy of his draft Defence. Suffice it to say that neither in the Notice of Motion nor in the affidavit did the Respondent allege any irregularity in the Judgment in default. So, obviously the Respondent was putting himself at the mercy of the Court and asking that in the exercise of its discretion the court may set aside the judgment. The application came before Ken During, J. (as he then was) for hearing on 9th November, 1971. Counsel for the Respondent stated inter alia that the default of the respondent had been due to inadvertence on the part of the respondent and referred to the draft Defence. Counsel for the Appellant Company on the other hand opposed the application on the ground that the respondent did nothing for several months after the service of the Writ of Summons on him and in the meantime execution had been levied and that in the circumstances, the application was too late. It is quite clear therefore that the argument before Ken During, J. proceeded on the basis that the judgment was a regular judgment. At the end of the argument the learned Judge refused the application without assigning any reasons.

On the following day (i.e. 10th November, 1971), a Solicitor entered appearance to the Writ of Summons on behalf of the Respondent, and on the same day he took out a Notice of Motion on behalf of his client applying for an order that the whole proceedings be set aside on the ground of

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irregularity. The motion came before Tejan J. (as he then was) on 12th November, 1971. It was adjourned on the ground that it was short-served bu t the learned Judge however granted an interim stay of execution of the writ of Fieri Facias. The motion was heard by Tejan J. on 30th November, 1971. Counsel for the respondent stated inter alia that the application was for an order to set aside the judgment obtained on 14th June, 1971 on the ground of irregularity. Counsel for the Appellant Company stated that the same application had been made before Ken. During J. and that the learned Judge had dismissed it. In reply Counsel for the respondent said inter alia that the application was not based on the same facts which Ken. During J. had deliberated upon, and that the irregularity was discovered after the application to Ken. During J. The ruling of Tejan J. was short. He said:-

> "I have considered the arguments of both counsel. There is no doubt a breach of the rules has been committed. In the interest of justice, I allow the application to set aside the judgments. Costs in the cause."

The Appellant Company appealed against that order to the Court of Appeal on one ground, namely:-

> "That the learned Trial Judge had no jurisdiction to entertain the Respondent's Notice of Motion dated 10th November, 1971 by reason of the fact that on the 9th day of November, 1971 the High Court of Sierra Leone by an Order of the Hon. Mr. Justice Ken O. During had dismissed a similar application made by the Notice of Motion dated 2nd November, 1971 which said order remains in full force and effect."

The Appeal was heard by the Court of Appeal on the 24th and 25th days of May, 1972. After listening to two days of argument by Counsel for both parties the Court gave the following judgment on 25th May, 1972:-

> "In the interest of Justice we feel that the action should go to trial. We therefore invoke our powers under Rule 36 of the Court of Appeal Rules and dismiss the Appeal. No order as to costs."

It is against that judgment that the Appellant Company have appealed to this Court.

The main issues in this appeal may be stated thus:-

(i) Whether Tejan J. had jurisdiction to entertain the application to set aside the judgment in default after a similar application had been dismissed by Ken. Du ring J.

(ii) Assuming that Tejan J. had jurisdiction, was his decision to set aside the judgment in default right?

(iii) Whether the Court of Appeal was right in dismissing the Appeal.

Dealing with the first issue stated above, Dr. Marcus-Jones, learned Counsel for the Appellant Company, submitted that in view of the fact that Ken. During J. had dismissed the respondent's application to set aside the judgment in default, neither Ken. During J. nor any other judge of the High Court had jurisdiction to entertain any other application to set aside the judgment and that the only remedy of the respondent was by way of appeal. In order to determine the soundness of this submission it is necessary to consider the power of the High Court to set aside a judgment in default of appearance. The power of the High Court to set aside such judgments is contained in Order 10 Rule 10 of the High Court Rules which is in the following terms:-

> "Where judgment is entered pursuant to any of the preceding rules of this Order it shall be lawful for the Court to set aside or vary such judgment upon such terms as may be just."

It is well settled that in exercising the power conferred by this rule, the Court should draw a distinction between a regular judgment and an irregular judgment. In the case of a regular judgment, the judge has a discretion, having regard to all the circumstances, as to whether to set aside the judgment or not. But in the case of an irregular judgment, the judge has no such discretion; the applicant is entitled to have the judgment set aside Ex debito justitiae which in ordinary language means that he is entitled to have it set aside as of right. In the words of Upjohn L.J.

(as he then was) "This means no more than that, in accordance with settled practice, the Court can only exercise its discretion in one way, namely, by granting the order sought." (See In re Pritchard deceased. (1963) 2 W.L.R. 685 at p. 696 C.A.).

In this connection, it is pertinent to quote also the words of Fry L.J. in Anlaby v. Praetorius (1888) 20 Q.B.D. 764 C.A. He said at p.768

> "In such a case the right of the defendant to have the judgment set aside is plain and clear. The Court acts upon an abligation, the order to set aside the judgment is made ex debito justitiae, and there are good grounds why that should be so, because the entry of judgment is a serious matter, leading to the issue of execution, and possibly to an action of trespass."

and he said at p. 769

> "There is a strong distinction between setting aside a judgment for irregularity, in which case the Court has no discretion to refuse to set it aside, and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the Court has a discretion to impose terms as a condition of granting the defendant relief."

As I stated earlier, neither in the Notice of Motion which was heard by Ken During J. nor in the argument before him was any allegation of irregularity of the judgment made. The whole proceedings proceeded on the basis that the judgment was regular. On the other hand, and as I pointed out earlier, irregularity was alleged in the Notice of Motion which was heard by Tejan J. and Counsel for the respondent stated that the application was to set aside the judgment on the ground of irregularity. So whilst Ken. During J. was asked to exercise his discretion to set aside the judgment, Tejan J. was asked ex debito justitiae to set aside the judgment. I therefore cannot accede to the view, urged upon as by Dr, Marcus-Jones, that the application dealt with by Tejan J. was the same as the one which had been disposed of by Ken. During J. It is therefore erroneous to contend that Tejan J. constituted himself into a Court of Appeal over the exercise of

discretion by Ken. During J. In my judgment Tejan J. had jurisdiction to entertain the application.

Learned Counsel for the Appellant Company relied on the case of In re Nazaire Company 12 Ch. D. 88 C.A. in support of his submission. The head note of that case reads:-

> "Under the system of procedure established by the Judicature Acts no Judge of the High Court has any jurisdiction to rehear an order, whether made by himself or by any other Judge, the power to rehear being part of the appellate jurisdiction which is transferred by the Acts to the Court of Appeal."

In my opinion, the simple answer ~~xxx~~ to that submission is that Tejan J. did not rehear or even purport to rehear the order of Ken. During J. As I have pointed out earlier the application which was dealt with by Tejan J. was quite different from that dealt with by Ken During J. In this connection I would adopt the words of Lord Atkin in Evans v. Bartlam (1937) A.C. 473 at p. 480 H.L. He said:-

> "The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

See also Craig v. Kenseen (1943) 1 All E.R. 108, C.A.

But quite apart from what I have just stated, there is an added reason why Tejan J. had jurisdiction to entertain the application, and that is that the applicant before Ken. During J. had no locus standi. As stated earlier, the respondent entered appearance to the writ of summons for the first time on 10th November, 1971 ~~xxxx~~ i.e. the day after the application had been dismissed by Ken. During J. So the Solicitor who filed the Notice of Motion and the papers which constituted the application before Ken. During J. was not on the record as Solicitor acting for the respondent or anyone at all. He was a stranger to those proceedings and the learned Judge should have taken no cognisance of any papers filed by him. Presumably that was why

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the learned Judge dismissed the application although he did not state any reasons. In contrast, when the other application came before Tejan J. the position was completely different. The respondent entered appearance on 10th November 1971. This he was entitled to do, in my judgment. Order 9 R. 13 of the High Court Rules provides that a defendant may enter appearance at any time before judgment. Judgment in default had already been entered, but it is settled and accepted practice under the rule that appearance entered after judgment would stand in the event of the judgment being set aside. It stands to reason therefore that since the intention of the respondent was to set aside the judgment, his first proper step was the entry of appearance. Thereafter the respondent filed the Notice of Motion which was eventually heard by Tejan J. In view of the foregoing, I am of the opinion that that was the only application to set aside the judgment properly made. In the circumstances Tejan J. clearly had jurisdiction to entertain it.

The next question is whether Tejan J. was right in setting aside the judgment. The answer would depend on whether or not the judgment was regular or irregular. But Dr. Marcus-Jones submitted that this Court should not consider this question because the application to set aside the judgment did not comply with Order 50 R. 3 of the High Court Rules which reads as follows:-

> "Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion."

It was conceded by Counsel for the respondent that no objections were stated in the Notice of Motion. The Notice of Motion merely alleged irregularity without specifying it. In those circumstances, should the Court of A ppeal or this Court set aside Tejan J's order on that ground?

In my opinion, the answer is No. The substance of the complaint is the non-compliance with a rule (i.e. O. 50 R. 3). The Rule Making body in its wisdom has made provisions for dealing with cases where there has been non-compliance with the Rules. Order O.50 R. 1 of the High Court Rules provides as follows:-

"Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit."

This rule empowers the Court to disregard irregularities and to decide on the material question. The Court is thereby enabled to do justice without placing undue premium on technicalities.

Counsel who represented the Appellant Company before Tejan J. did not take a preliminary objection to the Motion based on the ground of non-compliance of O. 50 R. 3. He allowed the Motion to go on without pointing out the irregularity to the judge. In my opinion, in those circumstances, he is deemed to have waived the objections. See Re Macrae (1884) 25 Ch. D. per Cotton L.J. at p. 19 C.A. Moreover, Tejan J. having entertained the motion in the irregular form, it is reasonable to presume that he invoked his powers under O. 50 R. 1 and decided to disregard the irregularity and decide the material questions.

Having disposed of the technical point raised by Dr. Marcus-Jones, I shall now turn to the substantial point as to whether the judgment in default was regular or irregular. The Appellant Company's claim was for damages for Breach of Contract and for wrongful detention of goods. The Statement of Claim also gives particulars of loss and damages suffered by the Appellant Company including the sum of Le.1,350. The rule under which the Appellant Company purported to enter judgment in default is O. 10 R. 7 of the High Court Rules which is in the following terms:-

"Where the writ is indorsed with a claim for damages only or for detention of goods with or without a claim for pecuniary damages and is further indorsed for a liquidated demand, whether specially or otherwise, and any defendant fails to appear to the writ, the plaintiff may enter final judgment for the debt or liquidated demand, interest and costs against the defendant or defendants failing

> to appear, and interlocutory judgment for the value of the goods and damages, or the damages only, as the case may be, and proceed as mentioned in such of the preceeding rules of this Order as may be applicable."

The Appellant Company entered final judgment for the sum of Le.1,350, and interlocutory judgment for damages. It is not surprising that they did not enter interlocutory judgment for the value of the goods, because according to paragraph 7 of the Statement of Claim the motor alleged to have been detained was returned to the Appellant Company on or about 19th August, 1970 i.e. before the issue of the Writ of Summons. In the circumstances the claim for "wrongful detention of goods" was unwarranted.

The question which calls for decision therefore, is whether the claim for Le.1,350 was a liquidated demand entitling the Appellant Company to enter final judgment for that amount. What then is a "liquidated demand"? In my opinion it means a claim for an amount which can be ascertained by calculation or fixed by any scale of charges or other positive data. A claim for a stated sum of money paid to the defendant for a consideration which has failed is a recognised form of liquidated demand. On the other hand when the amount depends upon the circumstances of the case and is fixed by opinion or by assessment or by what may be judged reasonable, the claim is generally unliquidated. I quote, with approval, the words of Barrowclough C.J. in the New Zealand case of Paterson v. Wellington Free Kindergarten Association Inc. (1966) N.Z.L.R. 468, at p. 471:-

> "In my opinion there can be no doubt that, in deciding whether a demand is liquidated, important factors are that it be capable of arithmetical calculation and that no investigation of the amount claimed should be necessary other than inquiry as to well-established scales of charges etc."

According to the Appellant Company's Statement of Claim, the Respondent agreed to execute the work for Le.1,350 and that amount was paid to him, but that when the respondent returned the motor to the Appellant Company the work had been "so inefficiently carried out" that the motor was unuseable and that

repaired it at a cost of Le.548. The sum of Le.1,350 was clearly money paid to the respondent for a consideration. But had the consideration failed? In my opinion, it had not, because it was admitted in the Statement of Claim that the respondent had done some work, albeit inefficiently. It was not a case where the workman gave himself out as possessing some skill which he did not possess or where he had done no work at all. In my opinion this was a case where the Court would have to assess the value of the work done by the respondent and arrive at the amount payable to the Appellant Company as refund and also as damages for breach of contract. It was not a case where the plaintiff was entitled to a refund of the whole amount. In those circumstances the claim for Le.1,350, was, in my opinion, not a claim for a "liquidated demand," but for unliquidated damages. In my judgment therefore the Appellant Company were not entitled to sign final judgment for the sum of Le.1350. And if they were not entitled to sign final judgment for that amount, the judgment was irregular. This conclusion is supported by a number of English cases. In Muir v. Jenks (1913) 2 K.B. 412 C.A. it was held that where a plaintiff signs judgment in default of appearance for a sum in excess of that which is due to him, the defendant is entitled to have that judgment set aside, subject to the right of the plaintiff, in a proper case, to apply to have the amount of the judgment reduced. In Hughes v. Justin (1894) I Q.B. 667 C.A. it was held that where a writ of summons is indorsed for a liquidated demand, which is reduced by payment after writ issued, judgment in default of appearance ought only to be entered for the amount actually due at the time when such judgment is entered, and the defendant has a right to have any judgment entered for a larger amount set aside.

It is settled law that where a plaintiff proceeds to sign judgment in default he must comply strictly with the rules empowering him to do so, and that failure to comply strictly with the rules would render the judgment irregular. This principle was stated by Vaughan Williams L.J. in Hamp-Adams v. Hall (1911) 2 K.B. 942 at p. 944 C.A. in these words:-

> "Where proceedings are taken by a plaintiff in the absence of the defendant it is most important that there should be at every stage a strict compliance with the rules"

And Buckley L.J. in the same case stated it as follows at p. 945

> "Where a plaintiff proceeds by default every step in the proceedings must strictly comply with the rules, that is a matter strictissimi juris."

In my opinion the judgment in default signed by the Appellant Company was not in compliance with O. 10 R. 7 and the judgment was therefore irregular. In my judgment, on the principle laid down in Anlaby v. Praetorius (supra) the respondent was entitled to have the default judgment set aside ex debito justitiae.

In my judgment, therefore, Tejan J. was justified in setting aside the judgment in default and the Court of Appeal were also justified in dismissing the appeal. I would dismiss the appeal.

E. Livesey Luke

Justice of the Supreme Court